FILED
AUG 22 1983
ALEXANDER L. STEVAS,
CLERK

83 - 301

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

ALASKA LUMBER & PULP COMPANY, INC.,
an Alaska corporation,
Petitioner,

vs.

REID BROTHERS LOGGING COMPANY,
an Alaska corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: August 22, 1983

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QUESTIONS PRESENTED

(1) *Denial of Jury:* Whether petitioner was denied its constitutional right to a jury trial and its right under Fed. R. Civ. P. 38(d) and 39(a) to withhold consent to plaintiff's withdrawal of jury demand upon the eve of trial, on the ground that petitioner had waived its rights by opposing a jury demand by plaintiff two years before.

(2) *Standard for Inferring Conspiracy:* Whether two firms in the same industry can be found to have conspired, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) based solely upon (1) a variety of legitimate business and personal contacts, plus (2) similar but not consciously parallel conduct.

STATEMENT REQUIRED BY RULE 28.1

Alaska Lumber & Pulp Company is an Alaska corporation and is affiliated with Alaska Pulp Company, a Japanese corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alaska Lumber & Pulp Co. (ALP) petitions for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals entered in this action. ALP also joins in the Petition for a Writ of Certiorari to review the same judgment submitted by co-defendant Ketchikan Pulp Company (KPC), pursuant to Sup. Ct. R. 19.4.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit Court of Appeals are reported at 699 F.2d 1292. The findings of fact and conclusions of law entered by the district court are not officially published, but are unofficially reported at 1981-2 Trade Cases ¶ 64,228 at p. 73,881. The opinions, findings and conclusions are set forth in Appendices A and B respectively.

JURISDICTION

The opinions of the Ninth Circuit Court of Appeals were filed on March 1, 1983. A timely Petition for Rehearing and Suggestion for Appropriateness of Rehearing En Banc was filed. This Petition was denied on May 23, 1983. See Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the district court was invoked under 28 U.S.C. § 1337. Jurisdiction of the Ninth Circuit Court of Appeals was invoked under 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY, AND PROCEDURAL PROVISIONS INVOLVED

This case concerns the proper interpretation of the federal antitrust laws, specifically sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and section 4 of the Clayton Act, 15 U.S.C. § 15. It also involves the seventh amendment to the United States Constitution and the meaning of Rules 38(d) and 39(a), Fed. R. Civ. P. These provisions are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

This petition asks the Court to review and correct the lower courts' denial of this petitioner's fundamental right to a jury trial (which resulted in judgment in plaintiff's favor in the ensuing bench trial against ALP and KPC for $1,489,881), and to decide an important and recurring issue of federal antitrust law which has created conflicts in the circuit courts.

Other questions crucial to the consistent interpretation and application of the Sherman Act are raised in the companion petition filed herein by KPC.

The first issue dealt with here arises because the district court, with the sanction of the majority opinion of the appellate court, ruled that plaintiff could unilaterally withdraw its jury demand without the consent of the opposing parties. This is directly contrary to the explicit provisions of Rules 38(d) and 39(a), Fed. R. Civ. P. The decision is also in conflict with other federal and state appellate decisions. The error is of special significance because it concerns the destruction of a right guaranteed by the Constitution: the right to trial by jury.

The second issue presents this Court with an opportunity to provide much needed definition to the kinds of conduct which may lead to an inference of antitrust conspiracy. The district court, again upheld by the appellate majority, inferred a conspiracy based upon general inter-firm contact plus similar, but not consciously parallel, conduct, even though that conduct was consistent with unilateral decision-making by each defendant. The decision creates a sharp conflict among the circuit courts on the issue of what are the legal standards for inferring a conspiracy to restrain trade. Proper definition of the limits of inference as to antitrust conspiracy poses an important, recurring issue of antitrust law which has engendered much conflict among the circuits and should be settled by this Court. In fact,

this Court recently granted certiorari to consider conspiracy issues very similar to those raised here. In *Weyerhaeuser Co. v. Lyman Lamb, Co.*, docket No. 81-1618, this Court granted certiorari to consider whether an antitrust conspiracy could properly be inferred from inter-firm conduct plus consciously parallel conduct. However, the parties in *Weyerhaeuser* dismissed the appeal by stipulation on June 14, 1983, (51 U.S.L.W. 3903) thereby leaving the issues unresolved. This case presents an even sharper focus for formulating appropriate legal standards on the issue of conspiracy.

The facts which give rise to the two questions presented here may be briefly stated.

A. Facts Surrounding Question (1)

On March 13, 1975, Reid Brothers Logging Company (RBLC) commenced an action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, seeking treble damages and injunctive relief against KPC and ALP. At the outset the case was consolidated for discovery with four companion cases. In each case plaintiffs filed a jury demand and sought consolidated trial of the five cases. On July 27, 1978, defendants moved to strike the jury demand, arguing that a jury could not absorb in a consolidated trial the facts of five complex and diverse antitrust cases, especially under the facts and theories then advanced by the plaintiffs. This motion was informally denied by District Judge Morell Sharp, to whom the cases were originally assigned, in an unreported chambers conference on July 31, 1978. Instead, in partial response to the motion, Judge Sharp tentatively ruled that the five cases would not be tried together, but rather that RBLC's case would be tried first as a pilot case. His reasoning was that the presentation of the theories and facts of five cases to a jury would present too many complexities, but that a jury could probably understand the facts of one case.

The issues of consolidation and jury trial were again argued with several other motions during a proceeding known as "Law Day'" on October 27 and 31, 1978. The court rejected plaintiff's renewed pleas for consolidation and adhered to its initial ruling that the Reid Brothers case would be tried separately to a jury.

Subsequently all five cases were reassigned to District Judge Barbara Rothstein due to Judge Sharp's illness. Judge Rothstein first met with counsel on May 29, 1980. After setting a trial date the court inquired, *sua sponte*, whether all parties would consent to waive the jury. RBLC promptly agreed to withdraw the jury demand which it had previously fought so hard to protect; KPC refused to consent to the withdrawal unless all parties agreed; and ALP refused to consent and instead filed a jury demand of its own. RBLC moved to strike ALP's demand and on July 7, 1980, one month before trial, the court granted RBLC's motion. The stated ground for this ruling was ALP had waived its rights by its opposition to a jury in the then five consolidated actions some two years before. Judge Rothstein denied ALP's demand despite the fact that for years all parties, including ALP, had proceeded with the understanding that there would be a jury, and despite the fact that the posture, facts and theories of the case had changed dramatically since the arguments concerning whether a jury could deal with five cases simultaneously. Fed. R. Civ. P. 39(a) was not complied with in that there was no written or oral stipulation whereby the parties mutually manifested consent to trial by the court without a jury.

A divided panel of the Ninth Circuit Court of Appeals affirmed the district court's order. The majority held that ALP had "waived" its right to a jury. It was also held that Rules 38(d) and 39(a) were "technical" and "formalistic" requirements which need not be adhered to, but instead were subservient to Fed. R. Civ. P. 1 which calls for "the just, speedy, and inexpensive determination of every

action." Allowing ALP a jury trial, the majority held, would "frustrate the purposes of the Federal Rules of Civil Procedure." The dissent strongly objected, finding that the majority position "ignores the practicalities of litigation" and "denigrates" the principle that every presumption should be made against the waiver of a jury.

B. Facts Surrounding Question (2)

The heavily regulated timber industry in Southeast Alaska centers upon a 500 mile stretch of timberland along the Alaskan-Canadian Border, virtually all of which is within the Tongass National Forest, under the control of the U.S. Forest Service (USFS). The quality of the majority of the timber is such that it can be used only for pulp. The USFS tried for decades to entice a pulp mill to the region. Because of the remoteness, high costs, and huge capital requirements, industry would not locate in the region under normal economic conditions. To achieve economic growth the USFS altered the free market conditions by enacting regulations which compelled that timber be processed in Alaska rather than exported as round logs. This limited the log market to mills in Alaska and thus, due to the nature of the timber, primarily to any pulp mill there. The USFS also offered long term contracts (50 years) with a guaranteed supply of timber if a pulp mill was built in conjunction with the sale. These were the only such offerings made in U.S. history.

In 1951 KPC successfully bid the first such offering, and opened a pulp mill in Ketchikan, Alaska, in 1954. The sale area was located in the South Tongass, an administrative area created by the USFS, near Ketchikan. In 1956 another long term sale area was successfully bid by ALP. This was located in the North Tongass. ALP opened its pulp mill in late 1959 in Sitka, Alaska. Although the USFS awarded two other long term sales for pulp mills, no other company built a pulp mill in the region, for reasons unrelated to this

lawsuit. Thus since 1960 KPC and ALP have operated the only pulp mills and provided the only market for the bulk of the logs harvested in Southeast Alaska.

ALP also operated a sawmill known as Wrangell Lumber Company (WLC) in Wrangell, Alaska, where higher quality logs were cut into cants[1] for export to Japan. Prior to 1969 KPC had no sawmilling facilities and thus sold or exchanged some of its higher quality logs to WLC for sawmilling. After 1969 KPC, at the urging of the USFS, expanded to include sawmilling. Throughout the period other smaller sawmills also operated.

The USFS also sold smaller short-term timber sales (approximately one to five years duration) through competitive bidding. Both ALP and KPC were expected by the USFS to obtain timber from these sales and both bid for these sales. The USFS set the dates when these sales were offered, where they would be, the type of logging equipment needed, the minimum price (stumpage) at which the timber would be sold and all other facets of the sales. These sales usually would be an extension of or near an existing logging operation so that that operator would have a bidding advantage for that sale due to not having to pay for moving, camp set-up or similar expenses.

Anyone meeting USFS financial requirements could bid on timber sales. A logger who purchases a sale, logs it, and sells the logs is called a "purchase logger." A logger who contracts to log a sale owned by someone else is called a "contract logger."

RBLC was a logger who had logged for both KPC and ALP. It bid, without competition, a sale called Muddy River No. 3 in 1972. As a purchase logger it obtained offers for

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[1]A cant is a log which has been cut into dimensions larger than ordinary dimensional lumber but sufficient to meet the USFS export manufacturing requirements.

the logs from KPC and another sawmill. Finding that it needed several hundred thousand dollars to start operations, RBLC asked KPC for financing. KPC agreed to provide financing but asked for security. Offering nothing else for security, RBLC assigned its rights to the Muddy River No. 3 sale to KPC (which was approved by the USFS at RBLC's request), and entered into an agreement with KPC to log the sale as a contract logger. RBLC never contacted ALP either to sell the logs or to ask about alternative financing. KPC and RBLC subsequently had a dispute, and RBLC terminated operations in September, 1973.

In March 1975 RBLC filed suit against KPC and ALP alleging that defendants had conspired to restrain trade and had jointly monopolized[2] the timber industry in Southeast Alaska in violation of Sherman Act §§ 1 and 2. RBLC also sued KPC for breach of contract. RBLC's Sherman Act damage claim was based on the assertion that KPC caused RBLC to assign the Muddy River No. 3 sale to KPC. This, RBLC argued, resulted in its losing the "purchase logger rights" to the sale which meant that it was unable to sell the logs (as opposed to contracting for services) as an entrepreneur. RBLC thus argued that it was damaged because it could not take advantage of the surprise increase in the demand for logs in 1973-74, thereby losing the profits in selling the logs in that market.

The district court, without citing any legal authority and adopting virtually verbatim findings of fact proposed

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[2]Although not directly analyzing the issue of joint or "shared" monopoly, the district court, in seven conclusionary sentences and without citation to authority, found that defendants "attained and exercised monopoly power in violation of section 2." ALP appealed this ruling to the circuit court on the ground that it could not be liable under a nebulous theory of shared monopoly. The circuit court affirmed but on the basis of a conspiracy to monopolize. App. A-10. Thus liability is bottomed on a claim of conspiracy and if there was no conspiracy there is no section 2 liability.

by RBLC, found there was a conspiracy because the evidence showed (1) there had been contacts and joint projects between defendants, and (2) there had been some similarity in the way their businesses were conducted from which the court inferred concerted action. The district court did not find that this similar conduct constituted "conscious parallelism," nor did any of the conduct involve or pertain to the events RBLC claimed injured it. (See discussion, *supra.*) Moreover, no finding was made that any of the activity would have been contrary to the business self-interest of either defendant if it had unilaterally engaged in the same conduct (*i.e.* the conduct was fully consistent with individual business conduct). Likewise, the district court did not find that any of the communications or projects between defendants involved or pertained to the claimed damage-causing events. Instead, the reasoning was simply that any act by either defendant was part of a conspiracy to injure RBLC.

A majority of the court of appeals affirmed, again without legal analysis, essentially repeating the district court's conclusions.

REASONS FOR GRANTING A WRIT

A. Defendants Were Wrongly Denied a Jury Trial

The district court and the court of appeals have turned their backs on the plain requirements of Rules 38(d) and 39(a). In holding, over a strong dissent, that "a literal reading of Rule 38(d) would act as an instrument of delay and frustrate the purposes of the Federal Rules of Civil Procedure" (App. A-24) the majority wrote off ALP's right to a jury as a "technical requirement" and an "instrument of delay." The majority has established the principle that one party alone may control whether there is a jury trial by unilaterally withdrawing its jury demand over the objection of an opposing party if the opponent has at any time in the past under any different circumstances opposed its

adversary's jury demand. A subjective rule is thus established whereby the district court is allowed to weigh the reasons for demanding a jury and to second-guess a party's intentions. This new rule applies regardless of what has occurred in the interim and despite the applicable Rules and the U.S. Constitution. The ruling inequitably allows the party filing the first jury demand to change its mind on this fundamental matter but denies a reciprocal right to the opposing party.

1. The Appellate Court Decision Creates a New Rule in Derogation of Fed. R. Civ. P. 38(d) and 39(a)

The seventh amendment to the Constitution unequivocally guarantees a right to a jury trial in civil cases such as this. This Court has repeatedly acknowledged that this right must be preserved wherever possible. E.g. *Jacob v. City of New York,* 315 U.S. 752, 752-53 (1942) ("A right [of jury trial] so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."). This Court has granted certiorari when a party has been deprived of its right to a jury

> because "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care."

Beacon Theatres v. Westover, 359 U.S. 500, 501 (1959), *quoting, Dimick v. Schiedt,* 293 U.S. 474, 486 (1935). Thus this Court has recognized there are "[s]pecial and important reasons for the grant of certiorari" when lower courts "deprive litigants of their right to a jury determination." *Rogers v. Missouri P.R. Co.,* 352 U.S. 500, 510 (1957).

The procedures implementing this right are found in Rules 38(d) and 39(a). Rule 38(d) provides that "[a]

demand for trial made as herein provided may not be withdrawn without the consent of the parties." The means for manifesting that consent is specified in Rule 39(a):

> The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . .

The district court ignored the clear language of these Rules. There was no stipulation to a court trial or consent to RBLC's withdrawal of its jury demand. Unless this Court intervenes, the high sounding principles regarding the "fundamental and sacred" right to a jury and the implementing provisions of the Rules of Civil Procedure become sheer rhetoric. The majority below expressly "looked beyond the facial language" of the Rules and created a new rule which would allow judges to make subjective judgments as to whether a party has somehow waived a jury trial without expressly consenting to the withdrawal of a jury demand.

In dismissing the Rules as "formalistic" and "technical," the majority created a conflict with other appellate authority which had held that the rules regarding the withdrawal of a jury demand require strict compliance. *See, Palmer v. United States,* 652 F.2d 893, 896 (9th Cir. 1981), where the court refused "to create an exception to the precise terms of [Rules] 38(d) and 39(a)" in order to find appellant had waived a jury, even though he had allowed the trial to the court to proceed to conclusion without objecting. The ruling represents a complete departure from the principle that Rule 39(a) should be applied according to its literal terms. 5 Moore's *Federal Practice* ¶ 39.03 at 39-7 (2d ed. 1980): "The theory of Rule 39(a) is that it should operate rather mechanically." The ruling is also contrary to state

appellate decisions which have considered whether a right to jury trial has been waived under similar rules and found that the precise strictures of the applicable rule or statute require full compliance. *See, Lee Wing Chau v. Nagai,* 44 Haw. 290, 353 P.2d 998 (1960); *Okmulgee Producing & Refining Co. v. Wolff,* 88 Okl. 188, 212 P. 415 (1923); *Hoover v. Abell,* 231 S.W.2d 217 (Mo. App. 1950).

In place of the objective criteria of Rules 38(d) and 39(a) the majority substituted an uncertain and indefinite standard which would allow the district court to interpret the prior conduct of the parties to determine whether one has unintentionally waived its right to a jury trial. The district court is also allowed to weigh stated and unstated reasons for a party's change of position on the jury issue and to determine if a party has sufficient reason for doing so. The creation of this subjective rule is a giant step in taking away, rather than "jealously guarding," this constitutional right. To deny a party's right to a jury trial on the ground that to do so will achieve a "just, speedy, and inexpensive" trial is to deprive ALP of its fundamental rights to assist the court in keeping its calendar current.

2. ALP's Earlier Opposition to a Jury Trial Did Not Constitute a Waiver of Its Right to a Jury

The fact that ALP years earlier, during the pretrial discovery phase of the case, objected to plaintiff's jury demand should be immaterial. However, the majority justified the district court's order by ruling that ALP had "waived" its right to a jury by moving to strike its adversary's jury demand in a completely different context. This, the majority concluded, demonstrated a failure to rely on RBLC's jury demand and thereby constituted a waiver by ALP of its rights. Thus, due to a reluctance to undo the results of a substantial investment of judicial time and resources, ALP's fundamental jury right was made a sacrificial offering on the altar of judicial expediency. The net effect is to

turn the process on its head by allowing one party, the same party which earlier had strenuously argued that a jury was absolutely necessary, to change its mind and unilaterally determine whether the cause proceeds as a jury trial. The error of this reasoning was articulated by Judge Reinhart in his dissent:

> Merely because defendants argued at an early stage in the litigation that plaintiff did not have a right to a jury trial does not in any way suggest that, if the court concluded they were wrong, defendants would be willing to waive their continuing right to object to a subsequent change in position by plaintiff. Certainly, there would be no reason for defendants to give up their right to change their own position if circumstances changed. From defendants' standpoint, the implied waiver suggested by the majority served no purpose, other than to put the plaintiff in the position the majority finds it was—having exclusive control over the decision whether the trial would be by jury or by court, with the right to make that final unilateral decision based on the circumstances that existed just prior to the time of trial. I see no reason why objecting to an opponent's jury demand, whatever the basis for the objection, should entail such a consequence.

There is nothing in the Rules, decisional law, or the Constitution which prevents a party from changing its mind on this issue. In fact, the majority's opinion directly conflicts with the Ninth Circuit's earlier view that a party's change of position on the jury issue *should* be respected. *See DePinto v. Provident Security Life Insurance Co.*, 323 F.2d 826, 833 (9th Cir. 1963).

While no justification for a change in position on this issue should be necessary, sound substantive and tactical reasons for such a change are easily found in this case. ALP's original motion to strike the jury was filed almost

two years before RBLC agreed to withdraw its jury demand. In the interim it became firmly established that only one of several complex antitrust cases would be tried rather than several cases together as advocated by RBLC at the time the motion was made. During that time discovery continued, facts developed and the issues were narrowed and refined. Many of RBLC's claims were relegated to background status as a result of the Law Day hearings. The pretrial order was lodged, jury instructions were filed, and motions were made and granted which substantially reduced RBLC's damage claims. Entire theories of liability and damages were rejected by the district court and dropped by RBLC. The precarious nature of RBLC's claims became manifest when Judge Sharp expressed serious reservations that RBLC "may have a difficult task in proving that defendants' antitrust violations prevented Reid Brothers from logging the Muddy Rivers [sic] site as a purchase logger." (Even the majority recognized that this causation issue was a "vital question" which was "very close." App. A-15.) Due to the drastic change in circumstances in the stature of the case ALP had abundant reason to change its mind and seek a jury, thereby relying on RBLC's jury demand. The district court and the majority, without stating reasons, disregarded these facts and, applying a subjective test, allowed RBLC to switch positions but denied the same right to the other parties. The fundamental unfairness of allowing RBLC to change its position for tactical reasons, yet denying a reciprocal right in ALP, is self-evident.

To bolster its conclusion the majority characterized the single motion as "persistent efforts of ALP to defeat RBLC's jury request." App. A-23. The motion was filed before Judge Sharp entered his August 30, 1978, order setting the Reid Brothers case to be tried first, and the briefing on the motion continued after that date. The motion was not renewed by defendants during the Law Day

hearing in October as suggested by the majority. Judge Sharp even commented to RBLC's counsel that defense lawyers were not arguing the jury issue. It was RBLC who raised again the trial consolidation issue, and, in fact, conceded that defendants were arguing that "the cases together would be too complex for a jury." (Oct. 31, 1978, Hearing Tr., p. 279.) After the issue was finally resolved in October 1978, ALP took no further steps to "defeat" a jury. To the contrary, ALP filed comprehensive jury instructions and approved and signed a Pretrial Order which provided that the case would proceed as a jury trial. Thereafter ALP relied upon the fact there would be a jury and acted accordingly. Moreover, regardless of the arguments made in 1978, the changes which occurred thereafter, as described above, gave ALP abundant reason to reassert its jury right, just as they gave RBLC reasons to drop its jury demand. As the dissent stressed, even if defendants may not have initially relied on RBLC's jury demand, they did "rely from the outset on the Rules that provide that once a demand is made, it cannot be withdrawn unilaterally." App. A-31.

3. The Majority's New Rule Imposes an Unworkable Standard

The Rules provide easily definable means for determining whether consent to a jury demand withdrawal has been given. Under Rule 39(a) only two simple questions need be asked: (1) is there a written stipulation filed with the court, or (2) is there an oral stipulation made in open court and entered on the record? Under the majority's holding, if a party at any time opposes a jury trial a court can deem such conduct a waiver and hence arbitrarily destroy that party's right later to insist on a jury. In exercising this discretion the district court presumably would weigh the nature of the previous conduct, the status of the case, and whether crediting a party's seventh amend-

ment rights might interfere with a "just, speedy, and inexpensive determination" of the case. The record shows here that the district court's primary motivation in ignoring ALP's refusal to consent to a bench trial was the court's preoccupation with getting the case to trial as soon as possible in view of delays caused by Judge Sharp's illness.

The Rules expressly provide that once a jury demand is filed it cannot be withdrawn absent simultaneous and unanimous consent, thereby giving "each party an effective veto over the withdrawal of a jury demand . . ." *Rosen v. Dick*, 639 F.2d 82, 92 (2d Cir. 1980). The Rules provide certainty. Adherence to an objective standard will limit wasteful retrials because the likelihood of lower court error is diminished if it is clear that strict compliance with the Rules is necessary. A rule providing "certainty" will go much further to accomplish a "just, speedy, and inexpensive determination of every action" than the ambiguous, uncertain and unfair criteria sanctioned by the majority.

4. Conclusion

The majority's decision conflicts with other authority and has radically departed from accepted procedure as defined by the Federal Rules. It is implicit in the majority's opinion that a litigant cannot rely on the Rules and will act at its peril in doing anything which may suggest waiver of a jury. The majority's decision regarding waiver directly conflicts with this Court's clear direction that courts should indulge every reasonable presumption *against* waiver of the right of jury trial:

> It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.

Hodges v. Easton, 106 U.S. 408, 412 (1882). *Accord, Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1936). This

Court should grant certiorari and remand the case for jury trial.

B. This Case Provides a Vehicle for This Court to Clarify the Legal Standards Under Which Conspiracy Can Be Found Under Section 1 of the Sherman Act

Antitrust "conspiracy" is not a self-defining concept, and finding liability by inference is nebulous at best. Lower courts have struggled to define and apply appropriate legal standards, resulting in a patchwork of rulings as to whether evidence exists to establish a conspiracy under the Sherman Act. This has resulted in inconsistent and inequitable conspiracy findings. These conflicting decisions have made it impossible for business, let alone lawyers or the courts, clearly to define what is legally competitive and what may lead to enormous treble damage liability.

This case is an outstanding example of what can happen in the absence of clearcut guidelines. Neither the district court nor the appellate majority expressly applied the law to the facts. Instead, each court concluded that there was an all-encompassing conspiracy that permeated all facets of a complex industry, and thereby found RBLC automatically entitled to damages. Certiorari is particularly appropriate here because it dramatizes issues which are fundamental to the proper enforcement and application of the Sherman Act: Whether a conspiracy can be inferred from the fact of (1) business and social contact between employees of the two defendants plus (2) similar, but not even consciously parallel, conduct which (a) is consistent with what would be expected in a competitive market, and (b) is not the basis for the damage claims made by the plaintiff.

1. Conspiracy Cannot Be Inferred From Legitimate Inter-Firm Contacts

The majority inferred that a conspiracy had been "sustained" by an "uninterrupted pattern of communications." App. A-5. The critical missing link is that there is nothing tying these communications to any of the conspiratorial conduct cited by the majority, nor to the conduct RBLC claimed injured it.

It is true that over a sixteen-year period before the complaint was filed there had been business dealings and friendly contacts between the defendants. Yet this is hardly surprising since defendants were the only businesses of their kind in a remote section of the country. The USFS characterized these mills as a "pioneering undertaking" which would "be accompanied by unusual risks due to many unknown conditions." (USFS-KPC long-term contract, 1951) In surmounting these "unusual risks" and in breaking this new frontier it is not surprising that the two businesses did share certain information. Consider the type of information the district court found so damning: logging techniques, construction devices, log scaling, wage scales, union contracts, matters of mutual interest relating to the USFS, and log towing rates. The business dealings included the fact that in the 1960s KPC sold some saw and cedar logs to ALP because ALP had special use for these grades and species. ALP also obtained some log price information from KPC in 1959 before ALP opened its mill because it found its pre-opening pro forma to be inaccurate and KPC was the only existing source for such information. Collusion was also found because KPC's timber manager was "a personal friend" of ALP's counterpart[3] and had spoken with other ALP executives. Defendants were even condemned because they "had frequent contact at meetings of trade associations." App. A-46.

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[3]Both men left the business before the applicable statute of limitations.

While defendants' employees discussed many matters of common interest, and defendants did some business with one another, the district court jumped to the conclusion that these contacts led to anticompetitive agreements not to bid against each other for timber sales, to bid against "outside" mills, etc. The drawing of an inference of illegal conduct from these legitimate and necessary contacts conflicts with established precedent that an inference of conspiracy cannot be drawn from evidence of an opportunity to conspire. *Weit v. Continental Ill. Nat. Bank & Trust Co. of Chicago,* 641 F.2d 457, 462 (6th Cir. 1981) *cert. denied* 455 U.S. 988 (1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.,* 662 F.2d 935, 941 (2d Cir. 1981) *cert. denied* 103 S. Ct. 176 (1982). The courts here have done precisely the opposite: they have inferred a conspiracy because of the contacts and have reasoned therefrom that all conduct by defendants was the product of that conspiracy. It is easy to find a conspiracy if one begins with a presumption of illegal conduct. But the presumption should be the other way. *Boise Cascade Corp. v. FTC,* 637 F.2d 573, 581 (9th Cir. 1980).

The majority would require unreasonable monastic conduct by businessmen, shunning friends and business acquaintances, in order to avoid the very inferences made here. This conflicts with this Court's repeated admonition that the antitrust laws do not preclude contacts and information exchanges among businesses. *United States v. United States Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978); *Appalachian Coals, Inc. v. United States,* 288 U.S. 344 (1933); *Maple Flooring Manuf. Assn. v. United States,* 268 U.S. 563, 583 (1924). As this Court emphasized in *United States v. United States Gypsum Co., supra,* "salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error of judgment." While *Gypsum*

stressed the need for clear standards in criminal conspiracy cases, these observations are equally pertinent in civil antitrust cases. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) (discussing "the possibility that severe antitrust penalties will chill wholly legitimate business agreements.").

This Court must declare the extent to which mere contacts among competitors may be impermissible. Otherwise others may be caught in the same trap as ALP and be found to be co-conspirators due to an innocent exchange of information or business dealings a decade or more before a lawsuit is filed. In this case the USFS predicted that this "pioneering undertaking" would be "accompanied by unusual risks due to many unknown conditions." A risk that ALP did not foresee was that it would be exposed to treble damage liability from the mere fact of frequent contact with the only other pulp mill in Southeast Alaska.

2. Conspiracy Cannot Be Inferred from Similar Business Conduct When That Conduct Is Consistent with Individual Business Decisions

The thrust of the majority decision is that similar business practices, coupled with unrelated inter-company communications reflecting an opportunity to conspire, can support a finding of illicit agreement. The practices were not found to be consciously parallel, or even the direct product of any of the communications identified by the district court's findings. In fact, the legal theory upon which the majority reached its conclusion is nowhere stated.

Other decisions have been unanimous in applying the rule that consciously parallel conduct, even when accompanied by inter-firm contact, can rise to the level of conspiracy *only* where the challenged conduct would be inconsistent with or contrary to the self-interest of the individual firm if acting unilaterally. *E.g., Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 327 (D.C. Cir.

1982) *cert. denied* 103 S.Ct. 86 (1983) ("Only when the observed parallel behavior is inconsistent with the behavior to be expected from each actor individually pursuing its own economic interest may an agreement be inferred from parallel conduct."); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 884 (9th Cir. 1982) *cert. denied* 103 S.Ct. 1777 (1983) ("[T]he courts also require that the plaintiff demonstrate that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not based on a good faith business judgment."); *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.) *cert. denied* 454 U.S. 1031 (1981); *Weit v. Continental Illinois National Bank & Trust Co., supra.* Otherwise, as a matter of law, individual competitive decision-making is as likely and logical an inference to draw as concerted conduct, since "like businesses are generally conducted alike." *Independent Iron Works, Inc. v. U.S. Steel Corp.*, 322 F.2d 656, 661 (9th Cir.) *cert. denied* 375 U.S. 922 (1963).

If a conspiracy cannot be found when the challenged conduct is consciously parallel yet not inconsistent with unilateral activity, it is impossible to see how one can be inferred where the conduct is not even consciously parallel but is merely similar. Yet that is exactly what the majority has done. It has drastically departed from the accepted standard and found a conspiracy merely because of similar activities irrespective of whether the conduct is equally consistent with unilateral decision making. Absent an explicit statement of law from this Court there will remain confusion which will lead to aberrations such as this case.

The majority inferred conspiracy from three general "activities".[4] These will be examined in some detail in order

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[4]At RBLC's urging, the courts below placed RBLC's conspiracy proof into specific categories. But a conspiracy cannot be inferred from a collection of unrelated events because "there can be no synergistic result . . . from a number of acts none of which show

to show that they are consistent with unilateral decision making and hence not conspiratorial under established authority:

a. *Refusal to compete* (App. A-4): It was found that defendants confined their bidding on independent timber sales to those offered near their long-term sale area and thereby refrained from bidding against each other. Simply stated, both defendants followed the similar course of limiting their bidding to sales in areas in which they normally operated: ALP in the North Tongass and KPC in the South Tongass. This is entirely consistent with individual business conduct for reasons left unaddressed by the courts below. Defendants' mills are about 350 water miles apart. For ALP to bid on sales offered near Ketchikan would be like expecting mills in northern California to compete for timber sales in southern Washington. Such competition is complicated by the fact that the North and South Tongass are separated by large expanses of open water. To tow logs across these stormy seas is dangerous and unreliable due to weather and tides. Greater towing distances also mean greater costs. In fact, when the USFS sets the minimum price (stumpage) for any sale it includes a tow charge to the nearest mill, thereby creating a natural cost disadvantage for any other mill. Other policies of the USFS led to this situation, including the fact that (1) it offered sales within the confines of its own administrative areas (which happen to coincide with the "operating areas" in which the district court found that defendants confined their bidding) specifically to meet the needs of industry within those areas, (2) it announced sales a year or more in advance so that a bidder could plan for its needs from nearby sales rather than gambling on remote sales, and

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causal antitrust injury to [plaintiff]." *Cal. Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 746 (9 Cir. 1979). *Accord, City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928 (2d Cir. 1981).

(3) it offered sales close to where there was an existing camp in order to allow for continuing operations, thereby giving that operator a natural bidding advantage against outsiders. This latter fact allowed potential bidders to know which sales would be of particular interest to each operator and thereby to steer clear of those seen to entail heavy competition, a situation found "normal" and "not the result of any conspiracy" by other courts. *United States v. Champion International Corp.*, 1975-2 Trade Cas. ¶ 60,453 at p. 67,040 (D. Ore. 1975) *aff'd* 557 F.2d 1270 (9th Cir.) *cert. denied* 434 U.S. 938 (1977).

These facts reveal that the practice of bidding on sales close to one's own mill and not bidding on remote sales in areas where another mill normally operated and had substantial cost advantage is totally consistent with unilateral decision-making. It is also *not* inconsistent with individual firm economic self-interest. Moreover, there was no documentary evidence that defendants agreed to divide up the Tongass or refrain from bidding against each other.[5] Indeed, contemporaneous KPC documents spoke of bidding "to show ALP . . . that we mean business" and to "push ALP out of the South Tongass." ALP internal documents speak similarly of KPC. Despite this, however, the majority found the conduct indicative of a conspiracy.

b. *Exclusion of competing mills* (App. A-6): The majority inferred a conspiracy because each defendant at one

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[5]The district court and the majority rely heavily on an internal 1974 KPC memo which discusses the advantages of "realigning" operating areas. This is fully consistent with the fact that due to geographic, economic and administrative reasons discussed the mills' operations had become naturally "aligned." At most, this memo reflects the individual thinking of one KPC employee. It was uncontested that the memo and its contents were never discussed with ALP and were never acted upon. The memo was simply disregarded by its author's superiors.

time bid against an outside mill (*i.e.* a mill from outside Southeast Alaska seeking a timber sale) or had close business ties with existing sawmills. Strikingly absent from either the district court's findings or the majority's opinion is the citation to any evidence linking the conduct of one defendant to the other or showing that any such activity was inconsistent with unilateral conduct.

The district court found that ALP and KPC faced a shortage of timber. Yet, when outside mills bid on the few larger, more desirable sales for which either ALP or KPC would be expected to compete, the court inferred a conspiracy because they did compete. This occurred on a few sales in 1966-67. In every case the sales were either offered as continuations of million dollar operations already established by one of the defendants or had other features which made them uniquely attractive to one or the other defendant. The sales were bid by defendants consistent with their individual business self-interest. Obviously, because defendants were already established they could afford to bid higher than an outside mill. The USFS recognized at the time that "existing industries now have bases in Alaska and local know-how that permits them to bid effectively on timber offerings" and that "the fact that some bidders have an advantage in bidding by their established locations, or special markets, is part of the free enterprise system of doing business." (USFS letter to Senator Jackson, May 9, 1966, Trial Ex. A-935.)

Critically absent is any showing that either defendant could not recover its costs at the price bid on any sale. To find such bidding anticompetitive and predatory, and hence indicative of conspiracy, without some objective standard, creates unbearable hazards for anyone engaged in any bidding practice. As demonstrated by KPC's companion petition to this Court, other courts addressing this question have overwhelmingly found a need for establishing some cost-based standard for determining predatory con-

duct. The majority decision conflicts with this authority and creates a test which businessmen cannot be expected to understand and abide by, no matter how conscientious they may be.

ALP was found to have conspired with KPC because each had separate business dealings with different sawmills. The district court identified some of these dealings but did not find them parallel, or even similar, and made no finding linking the dealings to any illegal compact. App. A-53. The majority does not either. Instead it dwells on KPC's dealings with the Alaska Prince mill, pointedly omitting any reference to ALP. App. A-6. Again it simply assumes that KPC's actions were in concert with ALP.

ALP had log supply and output purchase agreements with two small sawmills during the relevant time period. In conjunction with these, ALP also provided some financial assistance for mill expansion. All these arrangements were in the individual self-interest of ALP, and no finding was made linking those dealings with KPC. ALP acquired one failing sawmill (Alaska Wood Products in 1968) in order to expand its sawmill production, again in its own individual interest. Both the U.S. Department of Justice and the USFS reviewed the acquisition at the time, and raised no objection. Likewise, the activities of KPC vis-a-vis sawmills were consistent with unilateral decision making by KPC. The district court made no contrary finding nor any finding linking any of the activities together so that a conspiracy could logically be inferred, and the majority[6] does not either.

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[6]The majority makes a passing reference to defendants acting through "controlled corporations." App. A-8. This is nothing more than saying defendants acted through affiliated or subsidiary companies, which certainly is not unique or inconsistent with unilateral business conduct. ALP bid a handful of sales through such affiliates with the full knowledge of the USFS. No finding was made that defendants discussed, let alone agreed on, the use of affiliates, and RBLC claimed no injury because of such bidding.

c. *Payment of "low" log prices* (App. A-8): The majority concluded that both ALP and KPC based prices to loggers on the cost of logging and thus assumed the prices were "artificially low". Since both paid low prices, the assumption went, there must be a conspiracy. There was no evidence that ALP and KPC paid the same or even similar prices, or that the prices varied in unison, or that either defendant even knew what the other was actually paying. Such knowledge was denied by all defendant employees. There was no finding that defendants discussed pricing for logs at any time after ALP commenced operations in 1960. Conspicuously absent was any calculation showing that any price ALP actually paid was below what should have been paid in a competitive market. To the contrary, the evidence showed that under RBLC's expert's methodology, ALP paid RBLC a price *higher* than what RBLC should have expected in a competitive market. This, coupled with the court's finding that KPC also paid RBLC a price higher than the competitive price in 1972, refutes the majority's conclusions.

But the fact that each defendant may have consciously tried to keep low the price it paid for raw materials is certainly not contrary to its economic self-interest and is consistent with unilateral, as opposed to conspiratorial, conduct. *See, Shapiro v. General Motors Corp.*, 472 F. Supp. 636, 648 (D. Md. 1979) *aff'd mem.*, 636 F.2d 1214 (4th Cir. 1980) *cert. denied* 451 U.S. 909 (1981). Inferring a conspiracy to violate the antitrust laws simply because payment to some loggers is regarded as "low", is improper, absent some indication of an agreement between the alleged malefactors.

3. The Conspiratorial Conduct Was Not the Cause of RBLC's Injury

Perhaps the most amazing error is that the similar conduct the majority found supported an inference of conspiracy was not the conduct RBLC claimed injured it. As the

majority stated, RBLC's damage claim "rest[s] on the notion that RBLC, in an unrestrained market, could have operated Muddy River No. 3 as an independent purchase logger." App. A-12. It was because it transferred its purchase logger rights in Muddy River No. 3 to KPC that RBLC claimed it was injured. Thus it was found that had RBLC retained those rights and annually negotiated a log price, it could have reaped higher profits in the "bonanza" years of 1973-74.

But this injury-causing event was totally unrelated to the conduct the majority found formed the basis for the conspiracy. RBLC did *not* claim damages due to defendants' refusal to compete against each other for timber sales nor upon the elimination or exclusion of any sawmill. Nor was RBLC's damage claim based on "low prices." No finding was made that RBLC was underpaid as a contract logger or that the purchase logger price offered in 1972 by KPC was below the competitive market price. Damages were found solely because KPC's offer for the logs was based on a multi-year contract and RBLC assigned the sale to KPC, events far different from the conspiratorial conduct.

The lower courts' finding defies logic. Nowhere is found any explanation of how RBLC could have been injured by a conspiracy involving conduct completely apart from conduct found to be conspiratorial. RBLC admittedly did not ask if ALP would buy the Muddy River No. 3 logs despite the fact that RBLC had logged for ALP in the past and had received a higher than competitive market price, or the fact that the sale was in ALP's purported "operating area" in the North Tongass. Even RBLC argued to the district court that the injury-causing conduct of KPC (*i.e.* asking for the transfer of the timber sale as security for the financing) was *dissimilar* from ALP's practice, since the evidence was that ALP had never sought such an assignment when providing financing. The evidence also showed

that ALP *did* renegotiate the log price on an annual basis. Despite these fundamental *dissimilarities* in the claimed injury-causing conduct, the majority still inferred a conspiracy.

The majority found ALP liable for conspiracy because KPC's actions were a "manifestation of the conspiracy" made possible by "the continuing cooperation between" defendants. This does not follow: KPC could have asked, and did ask, for the security and other terms for its own business reasons, totally unrelated to any agreement with ALP. KPC's actions vis-a-vis RBLC were totally consistent with individual business conduct. In short, the majority found RBLC automatically injured because of a supposed conspiracy affecting other facets of the market. This is in direct conflict with this Court's rejection of "automatic damages" under Section 4 of the Clayton Act, 15 U.S.C. § 15. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). It also conflicts with the established law that a finding of one conspiracy does not infer that defendants probably engaged in another. *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 435 (5th Cir. 1977); *cf. Theatre Enterprises, Inc. v. Paramount Film Corp.*, 346 U.S. 537, 543-44 (1954).

4. The Need for Review by This Court

It has been more than a quarter century since this Court addressed the outer limits of inferring a conspiracy from consciously similar conduct. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra.* The majority below has radically departed from the standards since developed as to the extent similar conduct, coupled with inter-firm contact, can support an inference of conspiracy. This Court recently granted certiorari in another case which raised the issue of whether conscious parallelism plus inter-firm communication could support a finding of conspiracy. *Weyerhaeuser Co. v. Lyman Lamb Co.*, Su-

preme Court docket No. 81-1618, cert. granted May 17, 1982, 50 U.S.L.W. 3915. The *Weyerhaeuser* case, however, was subsequently dismissed by the parties on June 14, 1983, 51 U.S.L.W. 3903. The instant case raises the same issues as *Weyerhaeuser* except that the lower court rulings are even more startling since (1) the activities here are merely similar and not consciously parallel, and (2) the activities from which the conspiracy is inferred are not the activities upon which plaintiff bases its damage claims.

This Court should grant certiorari. The issues are of obvious importance: to provide the lower courts and the business community with guidance as to the circumstances under which Section 1 conspiracy can be inferred. This case provides an opportunity to provide clear guidance by this Court on this important issue, and to correct and avoid in the future conflicts among the circuits.

Respectfully submitted,

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